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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAVID TYMEL CUMMINGS, Defendant and Appellant.	B199017 (Los Angeles County Super. Ct. No. BA300756)

APPEAL from a judgment of the Superior Court of Los Angeles County. Luis A. Lavin, Judge. Affirmed as modified.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant David Cummings appeals his conviction for possession of cocaine base for sale. At trial, defendant represented himself in pro per. On appeal, he contends his right to counsel and due process rights were unlawfully abridged by the court, and the court abused its discretion in not striking a prior strike. We affirm and order the abstract of judgment modified.

PROCEDURAL AND FACTUAL BACKGROUND

The underlying facts leading up to defendant's arrest are of tangential importance to this appeal, so we only briefly describe them. Los Angeles County Sheriff deputies were on routine patrol when they observed defendant approach a woman on the sidewalk. There followed a hand to hand drug transaction. One of the deputies recovered a bindle from defendant's pocket, prompting defendant to admit at the scene that he was just "trying to make money." During the booking process additional bindles of cocaine were found on defendant's person. Defendant did not testify at trial.

After the jury found him guilty and the court conducted a bifurcated priors trial, the court sentenced defendant to 14 years in state prison.

DISCUSSION

Defendant claims his sixth amendment right to counsel and due process right to present a defense were violated when the trial court failed to appoint counsel for him after he purportedly changed his mind about representing himself. We disagree.

A. *Factual Background*

Defendant was arraigned on May 2, 2006, at which time he was represented by the public defender's office. After several continuances, the case was set for trial on October 11, 2006. When the case was called that morning, the deputy public defender advised the court that his client wished to make a motion under *People v. Marsden* (1970) 2 Cal.3d 118. The trial court conducted the *Marsden* hearing at

which defendant complained the deputy public defender had tried to convince defendant that he should not ask the court to sentence him on an earlier case in advance of the present trial, had called defendant an idiot, did not file a motion to strike a prior, and was not representing his best interests. The public defender spoke, and the court engaged in colloquy with defendant after which it denied the *Marsden* motion. Defendant claims no error in the denial of that motion.

Defendant then advised the court that he wished to represent himself. He completed a waiver of counsel form, and stated that he would be ready for trial in the next six days – the case had been trailing as 14 of 20 – with no need for a further continuance. The court discussed with defendant the disadvantages of self-representation, but found defendant had intelligently waived his right to counsel. In the course of taking the waiver, the court reminded defendant that the judge would not be there to help him and "there's not going to be any lawyer there to help you." Defendant said he understood, and then for the first time the court mentioned the term "standby counsel," a point that would come up later:

"THE COURT: You might have standby counsel appointed, but a standby counsel is not to give you any advice. In fact, they're specifically told not to talk to you. [¶] The idea of standby counsel is that if you end up forfeiting your pro per privileges because you act out in court or for whatever reason, there's a lawyer to step in and take over so we don't need a continuance of the trial. But you're not going to have anybody to give advice. [¶] . . . [D]o you understand that now?

"DEFENDANT: Yes, sir, I do."

Before leaving the courtroom, the deputy public defender advised defendant that if defendant were to change his mind later about representing himself and ask for a lawyer to be re-appointed, the public defender's office would assign the same attorney.

Over the next several days, pretrial proceedings were held but the trial did not start in the six days the court earlier had indicated. Among other things, defendant received discovery, and the prosecution amended the information. On October 13th,

another judge denied a defense continuance request, finding defendant was engaged in delaying tactics. On October 16th, still another judge granted a continuance to October 23rd as day 18 of 20. On October 23rd, another defense continuance was denied, and the trial was trailed for one day.

On October 24th, defendant and the prosecutor appeared before Judge Lavin who eventually tried the case. In the course of a discussion about civilian clothing, the following occurred:

"DEFENDANT: . . . Maybe can I talk to you just for a second? [¶] I want to ask if I can have standby counsel on this matter. It's been too much money. I wasn't allowed time to defend myself . . . . [¶] And I think I need to turn my case over before I make a mistake."

The prosecutor said she would submit as to standby counsel but pointed out that the case had been pending for "quite a period of time," and defendant even received a continuance after one trial judge had denied it.

The court denied the request for standby counsel but continued to address defendant. Defendant explained that he could not have been prepared in six days, he needed a subpoena form and an investigator, and "The judge . . . should never have granted me that status if . . . ." The trial court pointed out that defendant had almost two weeks from the grant of his pro per status to prepare. As the exchange continued, the court announced it was treating the defendant's remarks as a request for a continuance, which it denied. The court started jury selection later that day. Defendant continued to represent himself through trial until he asked for, and received, appointment of counsel in connection with his new trial and sentencing hearing.

B. *Defendant Was Not Deprived of His Right to Counsel or Due Process*

On appeal, defendant makes two interrelated arguments: First, he was denied his right to counsel by the court's refusal to appoint counsel shortly before trial started on October 24th. The second contention presupposes that defendant did not

ask for primary counsel to be appointed but that defendant actually asked for "appointed advisory" counsel, and the court's refusal to do so violated defendant's right to due process. The lynchpin missing from both arguments is the same: after he was given pro per privileges, defendant never asked for appointed counsel, nor did he ask for advisory counsel.

We start with a brief review of the variety of counsel arrangements available in a criminal case. First, a criminal defendant, of course, has a constitutional right to be represented by an attorney. (*Gideon v. Wainright* (1963) 372 U.S. 335, 344-345; *In re James* (1952) 38 Cal.2d 302, 310.) Second and alternatively, a defendant has the right to represent himself or herself. (*Faretta v. California* (1975) 422 U.S. 806.) This right is not absolute, requires a knowing and intelligent waiver, must be made timely, and may be forfeited if the defendant disrupts the trial. (*Id.* at p. 834, fn. 46.) An important factor for the court in ruling on a request for pro per status on the eve of trial is whether the defendant is also asking for a continuance. (See *People v. Tyner* (1977) 76 Cal.App.3d 352, 355 [motion made on first day of trial is not untimely if unaccompanied by request for continuance].)

Then, there are various descriptors used to characterize hybrid counsel/pro per situations. First, there is "advisory counsel," defined by one court as "an attorney who is present in the courtroom at the defendant's side, does not speak for him, and does not participate in the conduct of the trial but only gives him legal advice." (*Chaleff v. Superior Court* (1977) 69 Cal.App.3d 721, 731, fn. 6.) "Standby counsel" may be appointed to stand by, as a minister in waiting, " 'available to represent the accused in the event that termination of the defendant's self-representation is necessary.' " (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1164, fn. 14.) However the two terms, and the related "co-counsel," have been "loosely used" by California courts "to describe a multitude of situations in which both the accused and professional counsel are involved in the presentation of the defense case." (*Ibid*.; see also 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 261, p. 404.)

With this backdrop in mind, we review the essentially undisputed facts here. On October 11th, defendant made his *Marsden* motion which the court denied. As often happens, defendant then stated he wished to represent himself, which the court granted. The status of representation did not come up again until nearly two weeks later, on the day jury selection was set to commence. On October 23rd, defendant did not ask for the public defender's office to be reappointed. Rather he asked for "standby counsel." In considering the request, a trial court generally might inquire further whether a defendant understood the nuances of standby, advisory or co-counsel. Here defendant knew what standby counsel meant because he expressly said so back on October 11th when the court first raised the subject:

"THE COURT: You might have standby counsel appointed, but a standby counsel is not to give you any advice. In fact, they're specifically told not to talk to you [¶] The idea of standby counsel is that if you end up forfeiting your pro per privileges because you act out in court or for whatever reason, there's a lawyer to step in and take over so we don't need a continuance of the trial. But you're not going to have anybody to give advice. [¶] . . . [D]o you understand that now?

"DEFENDANT: Yes, sir, I do."

On October 24th, the court was entitled to consider the request in the context of what had taken place earlier. When defendant asked for standby counsel, the court reminded him of the previous admonition against self representation and that it would mean he would go to trial without "the assistance of a lawyer. That would include standby counsel. That is what you agreed to, and you, wanted to represent yourself. [¶] So I am not going to appoint standby counsel to you . . . ." The court and defendant continued the conversation which dealt with the reasons defendant was not ready for trial. At no time did defendant say he wanted to give up his pro per privileges. Nor did the subject come up again during the trial. During trial defendant did not hesitate to address the court on a number issues, including use of a prior for impeachment, reduction of a felony to a misdemeanor, probable cause, Miranda rights, and gang evidence. We see nothing in the record that suggests defendant

would have been reluctant to tell the court he wanted to withdraw his pro per status if that is in fact what he wanted.[1]

Defendant's statement, "And I think I need to turn my case over before I make a mistake" fell short of a request for appointed counsel. Although the lexicon of the law may not be required, a defendant is not entitled to invite error by uncertainty in the request to withdraw pro per privileges. "Equivocation of the right of self-representation may occur where the defendant tries to manipulate the proceedings by switching between requests for counsel and for self-representation, or where such actions are the product of whim or frustration." (*People v. Lewis* (2006) 39 Cal.4th 970, 1002.)

When defendant ultimately decided to forego representing himself and to ask for appointed counsel at sentencing, he had no trouble making his request understood. In the course of a discussion about waiving time because of a late probation report, defendant stated: "I was going to request that I be appointed counsel for the [sentencing] proceedings anyway and I was wondering if I could waive time for such." The trial court granted the request and appointed counsel.

We find it significant that, when defense counsel at the new trial motion argued that an attorney should have been appointed when defendant asked for standby counsel, the trial judge expressly stated he understood the earlier request as only for standby counsel, not that defendant wanted an attorney to represent him. "The court did not think [defendant] indicated he wanted to terminate his pro per

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[1] Defendant's failure to request re-appointment of counsel at trial may have been generated by his desire not to have the public defender's office represent him. He had complained at the *Marsden* hearing that the deputy public defender assigned to his case called him an "idiot" – a charge the public defender did not deny. Defendant had already been advised that if the public defender's office were reappointed, the same deputy would handle the case.

status, number one. Number two, I did think his request for standby counsel on the day of trial was essentially an attempt to continue the case further."[2]

Because defendant did not request to withdraw his pro per status on the first day of trial, we conclude the trial court did not err in failing to appoint counsel at that time.

Our analysis is essentially the same for defendant's second point on appeal – his due process rights were violated when advisory counsel was not appointed. Although a self represented defendant's right to advisory counsel has been the subject of debate, especially in noncapital cases (see, e.g. *People v. Bigelow* (1984) 37 Cal.3d 731 (*Bigelow*); *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 712 (*Goodwillie*); *People v. Garcia* (2000) 78 Cal.App.4th 1422, 1429-1432), we need not join in the discussion. Here, there was no mention of the term "advisory counsel" at any time during the trial, and no suggestion that defendant wished to continue representing himself but wanted the assistance of an attorney to give him additional advice.[3]

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[2] On appeal, defendant does not claim it was error not to appoint standby counsel. Defendant did not disrupt the trial, so even if standby counsel had been appointed, his or her role would have been de minimus.

[3] It is well settled that the decision whether to appoint advisory counsel is within the trial court's discretion. (*Bigelow, supra*, 37 Cal.3d at p. 742; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 554.) Here, for reasons already stated, even if it were said that defendant asked for advisory counsel, there would have been no abuse of discretion in denying the request. Moreover, any error would have been harmless inasmuch as this was a simple case and the evidence against defendant was strong. (See *Goodwillie, supra*, 147 Cal.App.4th at p. 716 [proper standard to determine prejudice in denying advisory counsel is whether a more favorable result would have been reasonably probable].)

C. *The Trial Court Did Not Err in Refusing to Strike a Strike*

At the time of sentencing, the prosecutor asked defendant to be sentenced to double the base term under the Three Strikes Law and defense counsel moved to strike the prior strike conviction. The court imposed the double base term sentence and additional enhancements for a total of 14 years. Defendant complains that the trial court should have struck the prior strike.

The standard on review is well known. The trial court is not to strike a strike unless it concludes that defendant is outside the sprit of the Three Strikes Law. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) We do not reverse the trial court's decision unless the trial court abuses its discretion. (*Ibid.*) Here, defendant's prior record included convictions from as far back as 1998 for residential burglary, unlawful possession of a firearm, attempted grand theft person, and a second unlawful firearm possession. In each instance he received a state prison sentence. Under these circumstances we cannot say that the trial court abused its discretion in treating the present offense as a second strike.

D. *The Abstract of Judgment Should Be Modified*

In their brief, the People point out that the abstract of judgment is incorrect in two respects. First, it fails to include a provision reflecting the trial court's order that defendant register as a narcotics offender. Second, it transposes the number of presentence actual days served and conduct days to be credited. Defendant did not respond to these points, and we agree with the People.

DISPOSITION

The clerk is directed to modify the abstract of judgment to (1) include the trial court's order that defendant register as a narcotics offender pursuant to Health and Safety Code section 11590, and (2) reflect that defendant's credit for actual time

served is 399 days and his good time/work time credit is 198 days. In all other respects, the judgment is affirmed.

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RUBIN, J.

WE CONCUR:

COOPER, P. J.

BIGELOW, J.